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No. 89-645

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IN THE
Supreme Court of the United States

October Term, 1989

MICHAEL MILKOVICH, SR.,
Petitioner,

vs.

THE LORAIN JOURNAL CO., THE NEWS HERALD
and J. THEODORE DIADIUN,
Respondents.

**BRIEF IN OPPOSITION TO
PETITION FOR WRIT OF CERTIORARI
To the Supreme Court of the State of Ohio**

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STATEMENT OF THE CASE

A. The Facts

The events leading to the instant litigation began in 1974. The Petitioner, Michael Milkovich, Sr. ("Milkovich"), had been the head wrestling coach of Maple Heights High School for many years. Under Milkovich's leadership, Maple Heights wrestling teams had won the state wrestling title several years in a row, and Milkovich himself had earned national recognition as a prominent sports figure.¹

¹ Milkovich's credits and awards are numerous. Evidence at the trial proceedings included Milkovich's brochure in which he advertised himself and his son as "the nation's outstanding wrestling family."

On February 9, 1974 Maple Heights wrestled a team from Mentor High School. Tensions ran high during the meet, and when the referee disqualified a Maple Heights wrestler a riot broke out involving spectators and team members from both squads. Milkovich—the Maple Heights coach—was an active participant in the fight.

J. Theodore Diadiun ("Diadiun") was a sportswriter for the News-Herald,¹ which served the Mentor community. Diadiun had attended the match and witnessed the fight, and he later wrote a series of articles criticizing Milkovich's conduct as well as that of the entire Maple Heights coaching staff.

As a result of the melee, the Ohio High School Athletic Association ("OHSAA") held hearings and issued sanctions against the Maple Heights team, including disqualification from the state tournament, a one-year probationary status, and a censure of Milkovich for his participation in the fight. Parents and team members then sued the OHSAA in the Court of Common Pleas of Franklin County, Ohio, seeking a restraining order. Milkovich and Dr. Harold A. Meyer, Commissioner of OHSAA, testified at the court hearing. On January 7, 1975 the court reversed the probation and ineligibility orders on due process grounds.

On January 8, 1975 the News-Herald published an article by Diadiun on its sports page ("the Article").² The headline read: "Maple beat the law with the 'big lie.'" Beneath the headline, in large, bold letters, appeared the words "TD says," and the carry-over page bore the title "... Diadiun says Maple told a lie."

¹ The News-Herald, which is not an incorporated entity, is owned and published by the Lorain Journal Company. The Lorain Journal Company, in turn, is owned by the Mansfield Journal Company, and that company is owned by Community Newspapers, Inc. See Sup. Ct. Rule 28.1.

² The Article is reprinted in the appendix to Milkovich's Petition for Writ of Certiorari.

The Article expressed Diadiun's belief that Milkovich and H. Don Scott (then Superintendent of Maple Heights Schools) had attempted to shift the blame to Mentor High School during the court hearing by misrepresenting the events leading to the OHSAA sanctions. Diadiun stated that he had attended both the wrestling meet and the OHSAA hearing and had discussed the court proceedings with Dr. Meyer, the OHSAA Commissioner. Near its end, the Article expressed Diadiun's commentary that:

Anyone who attended the meet, whether he be from Maple Heights, Mentor, or impartial observer, knows in his heart that Milkovich and Scott lied at the hearing after each having given his solemn oath to tell the truth.

Milkovich and Scott reacted to the Article by filing libel suits against Diadiun, the News-Herald, and the Lorain Journal Co., owner and publisher of the News-Herald.

B. The Proceedings Below

Milkovich filed his lawsuit on April 30, 1975. After discovery, the defendants (sometimes collectively referred to as "the News-Herald") moved for summary judgment. The trial court granted partial summary judgment on May 23, 1977, holding that Milkovich was a "public figure" within the meaning of *Curtis Publishing Co. v. Butts*, 388 U.S. 130 (1967). The case then proceeded to a jury trial. After five days of trial and at the close of Milkovich's case, the trial court granted the News-Herald's motion for a directed verdict. Milkovich appealed to the Eleventh District Court of Appeals, which reversed. *Milkovich v. Lorain Journal Co.*, 65 Ohio App. 2d 143, 416 N.E.2d 662 (1979), cert. denied, 449 U.S. 966 (1980). The News-Herald then appealed to the Ohio Supreme Court.

On March 20, 1980 the Ohio Supreme Court dismissed the News-Herald's appeal, and the News-Herald subsequently petitioned this Court for a writ of certiorari. The petition was denied, though Justice Brennan strongly dissented.⁴ *Lorain Journal Co. v. Milkovich*, 449 U.S. 966 (1980).

After remand to the trial court, the News-Herald again moved for summary judgment. The trial court granted the motion on September 4, 1981, finding that Milkovich had failed to present evidence sufficient to establish actual malice and that the Article was constitutionally protected opinion. On October 3, 1983 the court of appeals affirmed.

On December 31, 1984 the Ohio Supreme Court reversed, holding that Milkovich was not a "public figure" and that the Article was not constitutionally protected. *Milkovich v. The News-Herald*, 15 Ohio St. 3d 292, 297-99, 473 N.E.2d 1191, 1195-97 (1984).

The News-Herald sought review by this Court, but its petition for a writ of certiorari was denied. Once again, Justice Brennan dissented, strongly questioning the Ohio Supreme Court's determination that Milkovich was neither a "public official" nor a "public figure." *Lorain Journal Co. v. Milkovich*, 474 U.S. 953 (1985).

In the meantime, the related lawsuit of H. Don Scott—the Maple Heights Superintendent of Schools whose conduct was also criticized in the Article—had been following a similar, if slightly less convoluted path

⁴ Justice Brennan wrote: "This holding is clearly contrary to the First Amendment and to the relevant precedents of this Court. I had supposed it was settled that newspapers are privileged to publish their views of the facts, so long as those views are not recklessly or knowingly false. It matters not that such views may conflict with those of a court, for the press is free to differ with judicial determinations. In the libel area, neither a court nor any other institution is the 'recognized arbiter of the truth,' as the court below asserted." 449 U.S. at 969.

through the courts. Two years after *Milkovich v. The News-Herald*, 15 Ohio St. 3d 292, 473 N.E.2d 1191 (1984), in which the Ohio Supreme Court found Milkovich not to be a public figure or public official and the Article not to be constitutionally protected opinion, the Scott case reached the same court on Scott's appeal from the entry of summary judgment.

Convinced that its earlier decision had been egregiously wrong, the Ohio Supreme Court expressly overruled *Milkovich* "in its restrictive view of public officials." *Scott v. News-Herald*, 25 Ohio St. 3d at 248, 496 N.E.2d at 704. The court went on to hold that Scott—obviously a public official in the court's view—had presented "[n]o evidence . . . which would prove 'clearly and convincingly' that appellees made a false statement with a high degree of awareness of probable falsity." 25 Ohio St. 3d at 249, 496 N.E.2d at 705. The court also held that the Article—the very same Article at issue in the present case—was "an opinion, protected by Section 11, Article I of the Ohio Constitution," expressly overruling *Milkovich* on this issue as well. 25 Ohio St. 3d at 244, 496 N.E.2d at 701. Scott petitioned this Court for review of the Ohio Supreme Court's decision, but his petition was rejected as untimely.

When the Scott decision was announced, the *Milkovich* case was again on remand to the trial court with instructions to conduct a jury trial. Seeking to avoid the possibility of an inconsistent judgment, the News-Herald renewed its motion for summary judgment on the basis of the intervening decision in Scott. The trial court granted the motion, and its entry of summary judgment was affirmed by the court of appeals.⁵

⁵ Contrary to Milkovich's suggestion that the "law of the case" doctrine precluded the trial court from reconsidering summary judgment issues on remand, see Petition at 20, a well-recognized exception to the doctrine actually required the trial court to apply the intervening decision in Scott. See note 12 *infra*.

The Ohio Supreme Court dismissed Milkovich's further appeal on the ground that "no substantial constitutional question" was presented. From the Ohio Supreme Court's dismissal order, Milkovich filed the instant Petition for Writ of Certiorari ("Petition").⁶

Significantly, the case of Milkovich, who is represented by the same lawyer who litigated *Scott*, was ultimately controlled by the *Scott* decision on both the legal and factual issues, in that the same Article and the same evidence were involved. Thus, the instant Petition effectively seeks review of *two* cases, *Scott* and *Milkovich*, even though the petition for review in *Scott* was rejected as untimely.

⁶ Though styled as a dismissal, the Ohio Supreme Court's order actually constituted a denial of discretionary review. For this reason, Milkovich properly seeks a writ to the Ohio Supreme Court instead of to the Eleventh District Court of Appeals. See *R.J. Reynolds Tobacco Co. v. Durham County*, 479 U.S. 130, 138-39 (1986).

SUMMARY OF ARGUMENT

The Ohio Supreme Court held that the Article was "an opinion, protected by Section 11, Article I of the Ohio Constitution," and secondarily that "Diadiun's article was constitutionally protected opinion both with respect to the federal Constitution and under our state Constitution." *Scott v. News-Herald*, 25 Ohio St. 3d 243, 244, 254, 496 N.E.2d 699, 701, 709 (1986). As an alternative, entirely independent ground of decision, the court also held that "[n]o evidence was produced which would prove 'clearly and convincingly' that appellees made a false statement with a high degree of awareness of probable falsity." 25 Ohio St. 3d at 249, 496 N.E.2d at 705. This latter holding is not challenged by Milkovich in his petition for review. Even assuming that review of the federal opinion issue would be appropriate notwithstanding the primacy of the Ohio Supreme Court's state law holding on that issue, such review would not affect the outcome of the case in light of the alternative holding that the actual malice standard of *New York Times v. Sullivan* cannot be satisfied. *Herb v. Pitcairn*, 324 U.S. 117, 125-26 (1945). See *New York Times v. Sullivan*, 376 U.S. 254 (1964).

Review is also rendered inappropriate by the correctness of the Ohio Supreme Court's holding on the opinion issue. Evaluating both the "common meaning" of Diadiun's statements and the "larger objective and subjective context" in which they were made, the court properly concluded that "the average reader viewing the words in their internal context would be hard pressed to accept Diadiun's statements as an impartial reporting of perjury." 25 Ohio St. 3d at 252-53, 496 N.E.2d at 707-08. These and other factors fully justified the court's narrow holding that "'legal conclusions' in such a context would probably be construed as the writer's opinion." 25 Ohio St. 3d at 254, 496 N.E.2d at 709.

More importantly for present purposes, the legal standard adopted by the Ohio Supreme Court on the opinion issue was entirely consistent with federal precedent. The "totality of circumstances" test recognized in *Scott* was derived from and virtually identical to the four-part analysis of *Ollman v. Evans*, 750 F.2d 970 (D.C. Cir. 1984) (en banc), cert. denied, 471 U.S. 1127 (1985), a decision that Milkovich praises in his Petition. See also *Old Dominion Branch No. 496, Nat'l Ass'n of Letter Carriers v. Austin*, 418 U.S. 264, 284-86 (1974); *Greenbelt Coop. Pub. Ass'n v. Bresler*, 398 U.S. 6, 13-14 (1970). Neither the legal standard adopted by the Ohio Supreme Court, nor the factual, case-specific conclusions of its narrow opinion, represent important questions of federal law warranting review by this Court.

ARGUMENT

A. The Decisions Below Are Supported By Independent, Alternative Grounds.

In his petition for review, Milkovich raises the single issue of whether the Article contained constitutionally protected opinion as a matter of federal law. Review of this issue is not warranted, in that, as addressed in the second and third sections of this Argument, the federal "opinion" issue was correctly decided by the Ohio courts, both in this case and in the related case of *Scott v. News-Herald*, 25 Ohio St. 3d 243, 496 N.E.2d 699 (1986).

Review is also rendered inappropriate, however, by the presence of two independent bases for the decisions below. One of these involves the scope of protection afforded by the Ohio Constitution, an issue that is not reviewable by this Court. Cf. *Herb v. Pitcairn*, 324 U.S. 117, 125-26 (1945) (noting "the partitioning of power between the state and federal judicial systems and . . . the limitations of our own jurisdiction"). The other involves the total absence of evidence supportive of "actual malice," an issue on which review has not been sought. Because either of these grounds would support the decisions below notwithstanding a reversal on the federal opinion issue, review by this Court would not affect the ultimate outcome of the case.

1. The Ohio constitutional ground

Milkovich asserts that the scope of "opinion" protection under the federal constitution is squarely presented in this case. See Petition at 21. In fact, the Ohio Supreme Court's resolution of the opinion issue was premised primarily upon Section 11, Article I of the Ohio Constitution, and only secondarily upon the First Amendment to the United States Constitution.

Referring to the same Article that is challenged by Milkovich in the present case, the Ohio Supreme Court expressly held in *Scott* that:

We find the article to be an opinion, protected by Section 11, Article I of the Ohio Constitution as a proper exercise of freedom of the press.

Scott v. News-Herald, 25 Ohio St. 3d at 244, 496 N.E.2d at 701. This was the precise holding of the case. Indeed, the court referred to the federal constitution only in the conclusion of its opinion, stating that "[b]ased upon the totality of circumstances it is our view that Diadiun's article was constitutionally protected opinion both with respect to the federal Constitution and under our state Constitution." 25 Ohio St. 3d at 254, 496 N.E.2d at 709. Both the holding of the case and its procedural history support a presumption that the Ohio Supreme Court would stand on its resolution of the Ohio constitutional issue notwithstanding a reversal on the federal ground.⁷

In so stating, the *News-Herald* is mindful that the decision below may not fully satisfy the requirements of *Michigan v. Long*, 463 U.S. 1032, 1037-42 (1983). To meet the *Michigan v. Long* standard, a state court decision must indicate "clearly and expressly that it is alternatively based on bona fide separate, adequate, and independent grounds." 463 U.S. at 1041. Here, the Ohio Supreme Court's primary holding was based expressly and *only* upon the Ohio Constitution, but the court did not otherwise comment on the independence of that holding from its secondary holding under federal law. Nonetheless, the Ohio Supreme Court's resolution of the state constitutional issue should be given great weight, for two reasons.

⁷ As discussed later in the text, the *Scott* court felt so strongly that the Article contained constitutionally protected opinion that it overruled its two-year old decision in *Milkovich* to reach that result. Compare *Scott*, 25 Ohio St. 3d at 249-50, 496 N.E.2d at 705-06, with *Milkovich*, 15 Ohio St. 3d at 298-99, 473 N.E.2d at 1196-97.

First, strict application of the *Michigan v. Long* standard has failed to achieve the intended purpose—that is, striking an appropriate balance between the competing interests of state and federal judiciaries. See *Michigan v. Long*, 463 U.S. at 1041. In none of the reported opinions since *Michigan v. Long* has this Court found an alternative state law ground to be adequate and independent. Many cases have involved alternative holdings under state and federal law, but in no known instance⁸ has certiorari been denied because the state court included in its decision the magic language of *Michigan v. Long*.⁹

There are two possible explanations. It may be that the state court actually considered *Michigan v. Long* in each case and concluded that its resolution of the state law ground was in fact dependent upon its interpretation of federal law. More likely, the state courts simply did not appreciate the degree of particularity required by *Michigan v. Long*.

⁸ We recognize that certiorari has been denied in innumerable cases without opinion, and that in some of these cases the denial of certiorari may have been based on a "plain statement" by the state supreme court in satisfaction of *Michigan v. Long*. Our research would not have revealed such cases. Nonetheless, the absence of an express statement by the state court should not control—and has not always controlled—the determination of whether an alternative state law ground was adequate and independent under *Michigan v. Long*. See textual discussion and note 10 *infra*.

⁹ See *New York v. P.J. Video, Inc.*, 475 U.S. 868, 872-73 (1986); *New York v. Class*, 475 U.S. 106, 109-10 (1986); *Delaware v. Van Arsdall*, 475 U.S. 673, 676-77 (1986); *R.J. Reynolds Tobacco Co. v. Durham County*, 479 U.S. 130, 138 (1986); *Kentucky v. Stincer*, 482 U.S. 730, 735 n.7 (1987); *Maryland v. Garrison*, 480 U.S. 79, 83-84 (1987); *Michigan v. Chesternut*, 108 S. Ct. 1975, 1978 n.3 (1988); *Harris v. Reed*, 109 S. Ct. 1038, 1040-1045 (1989); *Florida v. Riley*, 109 S. Ct. 693, 695 n.1 (1989). In *California v. Freeman*, 109 S. Ct. 854 (1989) (O'Connor, Circuit Justice, on denial of application for stay), Justice O'Connor found that the California Supreme Court's decision rested on an adequate and independent state ground. Even in that case, however, the state court's decision did not include an express statement that its resolution of the alternative ground was independent of federal law. See note 10 *infra*.

If this latter explanation is the right one, then the *Michigan v. Long* standard is not satisfying the goal of providing state courts "with a clearer opportunity to develop state jurisprudence unimpeded by federal interference." See 463 U.S. at 1041. Because most state constitutions are derived from the federal constitution or have origins in common with it, resolutions of state constitutional issues can be expected to be "interwoven" with federal precedents in most cases. This fact—and the presence or absence of a "plain statement" by the state supreme court—should not alone determine whether the resolution of the state law issue was intended to be independent. In the present case, the Ohio Supreme Court's plain statement that its holding was based upon Section 11, Article I of the Ohio Constitution should be given effect by this Court, notwithstanding the absence of *Michigan v. Long* language.¹⁰

Even if the *Michigan v. Long* standard should be strictly applied, moreover, its application in the present case would establish only that this Court may review the decisions below. Compare *Herb v. Pitcairn*, 324 U.S. at 126, with *Michigan v. Long*, 463 U.S. at 1040-41. Because of the unique circumstances of the present case, the principles underlying *Michigan v. Long* would militate against the exercise of that discretion.

When a state supreme court decision fails to satisfy the requirements of *Michigan v. Long*, review by this Court is premised on the assumption "that the state

¹⁰ As illustrated by Justice O'Connor's opinion in *California v. Freeman*, 109 S. Ct. 854 (1989) (O'Connor, Circuit Justice, on denial of application for stay) the absence of an express statement by the state supreme court does not always justify the assumption that its determination of a state law ground was dependent upon federal law. In the present case, the Scott court overruled its two-year old decision in *Milkovich* in order to decide the case as it did, and its primary holding was based only upon the Ohio Constitution. That the Ohio Supreme Court intentionally based its holding on state law is "clear from the face of the opinion." *Michigan v. Long*, 463 U.S. at 1041.

court decided the case the way it did because it believed that federal law required it to do so." *Michigan v. Long*, 463 U.S. at 1041. The expectation is that reversal on the federal ground will result in a reconsideration and reversal by the state court on the state constitutional ground.¹¹

Such an expectation would be unwarranted in the present case. The Scott decision was itself a reconsideration of issues decided only two years earlier in *Milkovich*. See Scott, 25 Ohio St. 3d at 249-50, 496 N.E.2d at 705-06; *Milkovich*, 15 Ohio St. 3d at 298-99, 473 N.E.2d at 1196-97. Overruling its earlier decision in regard to the very same Article, the Scott court squarely held that the Article was "an opinion, protected by Section 11, Article I of the Ohio Constitution as a proper exercise of freedom of the press." *Scott v. News-Herald*, 25 Ohio St. 3d at 244, 496 N.E.2d at 701.

It is unreasonable to assume that the Ohio Supreme Court would reconsider the state constitutional issue a third time and overrule Scott, even if its decision on the federal issue were reversed by this Court. Where, as here, the assumptions underlying *Michigan v. Long* are unwarranted, discretionary review of the decision below should be declined. Indeed, *Michigan v. Long* itself recognized that "if the same judgment would be rendered by the state court after we corrected its views of federal laws, our review could amount to nothing more than an advisory opinion." 463 U.S. at 1042 (quoting *Herb v. Pitcairn*, 324 U.S. at 125).

¹¹ In the absence of such an expectation, review of the federal issue would violate the jurisdictional prohibition on advisory opinions. *Herb v. Pitcairn*, 324 U.S. at 125.

2. The "actual malice" issue

For yet another, independent reason, reversal on the federal opinion issue would not affect the ultimate outcome of this case. *Scott* was decided not only on the opinion ground, but also on the basis that there was no evidence tending to establish "actual malice" as required by *New York Times v. Sullivan*, 376 U.S. 254 (1964). This alternative ground was asserted by the News-Herald in its motion for summary judgment in *Scott*, and was expressly relied upon by the trial court when it granted that motion. Affirming the trial court's entry of summary judgment, the Ohio Supreme Court squarely held that:

The record herein . . . supports the determination of the trial court that actual malice could not be established. No evidence was produced which would prove "clearly and convincingly" that appellees made a false statement with a high degree of awareness of probable falsity. To the contrary, . . . the evidence showed that Diadiun believed his position to be correct, based on his observations and discussions concerning the actions of appellant.

Scott v. News-Herald, 25 Ohio St. 3d at 249, 496 N.E.2d at 705.

This holding was clearly correct. In response to the News-Herald's motion for summary judgment, no evidence was offered to suggest that Diadiun knew the Article to be unsupported in fact, or even that any statement in the Article, even if factual as opposed to opinion, was false. As early as 1981 the trial court examined all of the depositions, affidavits, and answers to interrogatories in its consideration of the News-Herald's second motion for summary judgment, finding that Milkovich's "documentary evidence fails to substantiate the existence of actual malice by clear and convincing proof." Nothing new has been offered since then.

When, in the aftermath of the *Scott* decision, the News-Herald renewed its motion for summary judgment in *Milkovich*, the absence of evidence tending to establish actual malice was again asserted as a basis, and the issue was fully briefed by the parties on Milkovich's appeal from the trial court's entry of summary judgment.¹² Correctly perceiving that both the opinion issue and the actual malice issue were controlled in *Milkovich* by the Ohio Supreme Court's intervening decision in *Scott*, the court of appeals did not consider the actual malice issue independently of the opinion question. As the court of appeals recognized, however, the same Article and all of the same evidence had already been considered in *Scott*, resulting in a clear holding by the Ohio Supreme Court that "[n]o evidence was produced which would prove 'clearly and convincingly' that appellees made a false statement with a high degree of awareness of probable falsity."¹³ *Scott v.*

¹² Reconsideration of summary judgment issues on remand did not offend the "law of the case" doctrine. The doctrine normally provides that "the decision of a reviewing court in a case remains the law of that case in the legal questions involved for all subsequent proceedings in the case at both the trial and reviewing levels." *Nolan v. Nolan*, 11 Ohio St. 3d 1, 3, 462 N.E.2d 410, 413 (1984). A number of exceptions, however, have traditionally been recognized by Ohio courts. See, e.g., *Nolan v. Nolan*, 11 Ohio St. 3d at 3, 462 N.E.2d at 413 ("the doctrine is considered to be a rule of practice rather than a binding rule of substantive law and will not be applied so as to achieve unjust results"); *Stemen v. Shibley*, 11 Ohio App. 3d 263, 465 N.E.2d 460 (1982) (syllabus at ¶ 2) (the doctrine does not apply "where the facts and issues . . . are substantially different from those which were previously before the appellate court"). In the *Nolan* case, the Ohio Supreme Court held that the law of the case doctrine is not binding on a trial court "in extraordinary circumstances, such as an intervening decision by the Supreme Court." *Nolan v. Nolan*, 11 Ohio St. 3d at 1, 462 N.E.2d at 410 (syllabus of the court).

¹³ The actual malice standard unquestionably applies to Milkovich. In its earlier decision in *Milkovich*, the Ohio Supreme Court had held that he was "not a public figure or public official as a matter of law." *Milkovich*, 15 Ohio St. 3d at 294-97, 473 N.E.2d 1193-1196. That

(Footnote continued on following page.)

News-Herald, 25 Ohio St. 3d at 249, 496 N.E.2d at 705. Milkovich has not challenged this holding in his petition for review.

As discussed below, the Ohio Supreme Court's resolution of the opinion issue under the Ohio and United States Constitutions was consistent with federal precedent and was otherwise correct. Even if this Court were to have a different view of the federal law, however, reversal on that ground would not affect the ultimate outcome of the case in light of the alternative holding of the Ohio Supreme Court on the actual malice issue.

B. The Legal Standard Adopted By The Ohio Supreme Court Under The Ohio Constitution Was Entirely Consistent With Federal Precedent.

Even assuming, arguendo, that the decisions below do not rest upon alternative, independent grounds, this case involves neither a conflict between decisions within the meaning of Rule 17.1(b) nor "an important question of federal law" within the meaning of Rule 17.1(c). Sup. Ct. R. 17.1(b), (c). The legal standard adopted in *Scott* and applied in the present case was entirely consistent with federal precedent, and will appropriately guide subsequent decisions of the lower courts in the State of Ohio.

(Footnote continued from preceding page.)

holding was strongly criticized by Justice Brennan in his dissent from this Court's denial of certiorari. 474 U.S. at 957-64. Quoting extensively from Justice Brennan's dissent, the *Scott* court expressly overruled *Milkovich* "in its restrictive view of public officials," noting that "both Milkovich and *Scott* were authority figures—individuals with substantial impact on their community." *Scott*, 25 Ohio St. 3d at 245-48, 496 N.E.2d at 702-04 (relying on *Rosenblatt v. Baer*, 383 U.S. 75, 86 (1966)). Under a well-recognized exception to the "law of the case" doctrine, the lower courts were obliged to apply the *Scott* decision in all subsequent proceedings in Milkovich's case. See note 12 *supra*.

Criticizing *Scott* for its "tortured logic," Milkovich compares *Scott* unfavorably with the District of Columbia Circuit's decision in *Ollman v. Evans*, 750 F.2d 970 (D.C. Cir. 1984) (en banc), cert. denied, 471 U.S. 1127 (1985). According to Milkovich, the "analytical framework and reasoning process [of *Ollman*] is meaningful and strikes a balance between the competing interests at stake," while "the same cannot be said of the Supreme Court of Ohio's approach in the case at bar." Petition at 33. In fact, the legal standard adopted in *Scott* is virtually identical to the standard endorsed by Milkovich in his discussion of *Ollman*.

Milkovich praises *Ollman* for its recognition that distinguishing between fact and opinion entails the "delicate and sensitive task of accommodating the First Amendment's protection of free expression of ideas with the common law's protection of an individual's interest in reputation." Petition at 30 (quoting *Ollman*, 750 F.2d at 974). The necessity of such an accommodation was also recognized by the Ohio Supreme Court in *Scott*. Noting that the distinction between fact and opinion "is not always easily made," the Ohio court cautioned that:

We are mindful of Judge Friendly's observation that one should not "escape liability for accusations of crime simply by using, explicitly or implicitly, the words 'I think.'" *Cianci v. New Times Publishing Co.*, *supra*, at 64. Accordingly, we are not persuaded that a bright-line rule of labeling a piece of writing "opinion" can be a dispositive method of avoiding judicial scrutiny.

Scott v. News-Herald, 25 Ohio St. 3d at 252, 496 N.E.2d at 706-07 (citing *Cianci v. New Times Pub. Co.*, 639 F.2d 54, 64 (2d Cir. 1980)).

The *Ollman* court identified four factors to be used "in assessing whether the average reader would view a statement as fact or, conversely, opinion." 750 F.2d at 979. As exemplified by Milkovich, these factors are:

- (1) What is the common usage or meaning of the specific language used? If the language used has a precise and understood meaning readers are more likely to conclude that the statement is factual;
- (2) Is the statement capable of being objectively verified? If not, a reader is less likely to believe that it has specific factual content;
- (3) What is the "full content" of the statement? The unchallenged language around the defamation may influence a reader's "readiness to infer that a particular statement has factual content";
- (4) What is the broader context or setting in which the statement appears? This factor applies because "[d]ifferent types of writing have ... widely varying social conventions which signal the reader of the likelihood of a statement being fact or opinion."

Petition at 30-31 (citing *Ollman*, 750 F.2d at 979). Milkovich agrees with the *Ollman* court that "contextual analysis is appropriate." Petition at 25. Indeed, Milkovich suggests, in reference to pre-*Ollman* decisions of this Court, that "[c]ontext appears to be the guiding light in these cases, combined with an objective assessment of the statement itself." Petition at 26 (discussing *Old Dominion Branch No. 496, Nat'l Ass'n of Letter Carriers v. Austin*, 418 U.S. 264, 284-86 (1974); *Greenbelt Coop. Pub. Ass'n v. Bresler*, 398 U.S. 6, 13-14 (1970)).

The Ohio Supreme Court also considered "contextual analysis" to be of critical importance, adopting in *Scott* a "totality of circumstances" test that incorporates, almost verbatim, the four factors of *Ollman*. Compare *Scott*, 25 Ohio St. 3d at 250, 496 N.E.2d at 706 ("it is our holding that a totality of circumstances test be

adopted ... to ascertain whether a statement is opinion or fact"), with *Ollman*, 750 F.2d at 979 ("We believe ... that courts should analyze the totality of the circumstances in which the statements are made to decide whether they merit the absolute First Amendment protection enjoyed by opinion."). Citing *Ollman*, the Ohio Supreme Court identified the four factors as follows:

Consideration of the totality of circumstances to ascertain whether a statement is opinion or fact involves at least four factors. First is the specific language used, second is whether the statement is verifiable, third is the general context of the statement and fourth is the broader context in which the statement appeared.

25 Ohio St. 3d at 250, 496 N.E.2d at 706. Like *Ollman* and the long line of cases that preceded it, the *Scott* decision used "contextual analysis" as the "guiding light," in conjunction with "an objective assessment of the statement itself." See Petition at 26. See also, e.g., *Ollman*, 750 F.2d at 976-77; *Old Dominion Branch No. 496, Nat'l Ass'n of Letter Carriers v. Austin*, 418 U.S. at 284-86; *Greenbelt Coop. Pub. Ass'n v. Bresler*, 398 U.S. at 13-14.

Milkovich concedes that "the Ohio court's four factors are similar in description to those developed in *Ollman v. Evans*." Petition at 34. Indeed, he quotes, apparently with approval, the Ohio Supreme Court's recognition that these factors are to be used "as a compass ... and not a map to set rigid boundaries." Petition at 34 (quoting *Scott*, 25 Ohio St. 3d at 250, 496 N.E.2d at 706). See *Ollman*, 750 F.2d at 979, 980 n.17 (cautioning that the four-factor analysis is "necessarily imperfect" and should not be applied "in a rigid lock-step fashion").

Though his Petition implies some general dissatisfaction with the "analytical framework" of *Scott*, Milkovich can identify no inherent flaw. He concedes that

the Ohio Supreme Court's "totality of circumstances" test is virtually identical to the *Ollman* standard he himself praises. Like *Ollman*, moreover, the Ohio Supreme Court recognized the need to accommodate competing interests, and cautioned against "bright-line" distinctions. Compare *Scott*, 25 Ohio St. 3d at 250, 252, 496 N.E.2d at 706, 708, with *Ollman*, 750 F.2d at 974, 980 n.17.

In reality, Milkovich's sole complaint is with the specific factual conclusions reached by the Ohio Supreme Court in regard to the Article in question. Those conclusions are necessarily limited to the cases themselves; even if incorrect, they will not detract from the appropriateness of the legal standard as a guide to the resolution of subsequent controversies by lower courts. More importantly for present purposes, factual, case-specific conclusions, standing alone, do not represent important questions of federal law, warranting review by this Court.

C. The Ohio Supreme Court's Factual Conclusions Were Entirely Correct.

Applying the "totality of circumstances" test to the Article in question, the Ohio Supreme Court concluded that the average reader would interpret the Article's content as an expression of the heart-felt opinion of the author, and not as a reporting of known or ostensible fact. See *Scott v. News-Herald*, 25 Ohio St. 3d at 253-54, 496 N.E.2d at 708-09. Milkovich complains that the *Scott* decision was based on "tortured logic and complete disregard of the language used by the Respondents." Petition at 35. Yet the *Scott* court adopted the four-part *Ollman* standard regarded by Milkovich as the correct one, and its "tortured logic" actually resolved two of the four factors in Milkovich's favor.

In reference to the first factor in the *Scott/Ollman* analysis, the Ohio Supreme Court found that the "common meaning" of part of the Article was that Milkovich had lied under oath. The court recognized that such statements will often constitute actionable libel, notwithstanding the constitutional protection of opinions. 25 Ohio St. 3d at 250-51, 496 N.E.2d at 706-07.

The court also sided with Milkovich under the second factor—i.e., "whether the statement is verifiable." In the court's view, the implication that Milkovich had lied under oath could conceivably be objectively verified, albeit through "a perjury action with evidence adduced from the transcripts and witnesses present at the hearing." 25 Ohio St. 3d at 252, 496 N.E.2d at 707.

In light of these findings, the *Scott* decision will hardly encourage the news media to believe that charges of criminal conduct will be taken lightly by Ohio courts. *Scott*'s four-part standard will prompt the lower courts to evaluate such charges with careful scrutiny, giving appropriate weight to the "common meaning" and "verifiability" of allegedly defamatory statements.

Consistent with federal precedent, however, the *Scott* court recognized that contextual analysis is also important, because a statement appearing factual and verifiable in one context will clearly be taken as an expression of opinion in another. *Scott*, 25 Ohio St. 3d at 250, 496 N.E.2d at 706. See *Ollman*, 750 F.2d at 978-79; *Old Dominion*, 418 U.S. at 284-86; *Greenbelt*, 398 U.S. at 13-14. Considering the third factor—i.e., "the larger objective and subjective context of the statement"—the *Scott* court noted that "[o]bjective cautionary terms, or 'language of apparency' places a reader on notice that what is being read is the opinion of the writer." 25 Ohio St. 3d at 252, 496 N.E.2d at 707. In the court's view, such terms as "in my opinion" or "I

think," though strongly suggestive of opinion, "are not dispositive, particularly in view of the potential for abuse." 25 Ohio St. 3d at 252, 496 N.E.2d at 707. Echoing the *Ollman* case and Judge Friendly's opinion in *Cianci v. New Times Publishing Co.*, 639 F.2d at 64, the court observed that no "bright-line rule of labeling a piece of writing 'opinion' can be a dispositive method of avoiding judicial scrutiny." 25 Ohio St. 3d at 252, 496 N.E.2d at 707. Here again, the cautionary language of the opinion underscored the narrowness of its holding.

In a reasoned analysis, the Ohio Supreme Court undertook the difficult task of evaluating whether the Article, in context, would be understood by the average reader as a reporting of fact, or, alternatively, as commentary or opinion. Though the labeling was "not dispositive" in the court's view, Diadiun's Article was clearly identified as commentary. The large caption contained, in bold letters, the phrase "TD says," and this advice was repeated in the second headline of the Article ("Diadiun says").

More importantly, the obvious purpose of the Article was not to report the commission of perjury or even that a charge of perjury had been made, but rather to express the author's outrage that persons responsible for the education of children would attempt to avoid responsibility for their own conduct. Having personally witnessed the altercation at the wrestling meet and having heard the original testimony before the Ohio High School Athletic Association, Diadiun believed that Milkovich and Scott should have admitted their culpability, and thus that their successful attempt to avoid responsibility at the later court hearing was disingenuous and irresponsible. In the Ohio Supreme Court's words:

Although the objective language of apparency is confined to the two headlines noted above, the author takes some care in setting forth the

subjective basis behind the article as the impetus to its creation. For example, Diadiun states: "When a person takes on a job in a school, whether it be as a teacher, coach, administrator or even maintenance worker, it is well to remember that his primary job is that of educator." The article goes on to reinforce this concern that those in positions of authority, at any level, also occupy positions of responsibility requiring candor should that authority be called into question. The issue, in context, was not the statement that there was a legal hearing and Milkovich and Scott lied. Rather, based upon Diadiun's having witnessed the original altercation and OHSAA hearing, it was his view that any position represented by Milkovich and Scott less than a full admission of culpability was, in his view, a lie.

Scott v. News-Herald, 25 Ohio St. 3d at 252, 496 N.E.2d at 707-08.

Indeed, the entire thrust of the Article was not an objective reporting of facts but rather a subjective reaction to the sequence of events. That the average reader would understand its content in these terms was recognized by the Ohio Supreme Court as follows:

The strongest statement made in the article, "Anyone who attended the meet, whether he be from Maple Heights, Mentor, or impartial observer, *knows in his heart* that Milkovich and Scott lied at the hearing after each having given his solemn oath to tell the truth" (emphasis added), further indicates that the question of whether or not a lie was actually made is ultimately a subjective determination. While Diadiun's mind is certainly made up, the average reader viewing the words in their internal context would be hard pressed to accept Diadiun's statements as an impartial reporting of perjury.

25 Ohio St. 3d at 253, 496 N.E.2d at 708 (emphasis by the court).

Implicit in the Ohio Supreme Court's reasoning was a recognition that the central theme of Diadiun's criticisms did not involve a matter of objectively verifiable fact. The day before the Article appeared, Maple Heights team members and their parents—supported by the testimony of Milkovich and Scott—had succeeded in reversing the sanctions previously imposed by the Ohio High School Athletic Association as a result of the fight. Diadiun's objection did not concern the specific content of the testimony, but rather the degree to which Milkovich and Scott had admitted responsibility or sought to avoid it, and the broader ramifications of their conduct in light of their positions at the high school. This was inherently a subjective judgment. It was, in fact, a subject of ongoing controversy in both the public forum and the media, a controversy on which Diadiun—and the Mentor community in general—had strong opinions.

Against this background, the Ohio Supreme Court reasonably concluded that Diadiun's readers would not accept specific statements in the Article as objective fact, but rather would evaluate them in the rhetorical context in which they were made. 25 Ohio St. 3d at 252-54, 496 N.E.2d at 707-709. See *Greenbelt Coop. Pub. Ass'n v. Bresler*, 398 U.S. at 13-14 ("blackmail" characterization would be understood in context as "rhetorical hyperbole" rather than as actual criminal charge); *Old Dominion Branch No. 496, Nat'l Ass'n of Letter Carriers v. Austin*, 418 U.S. at 284-86 (in the broader context in which it was published, "exaggerated rhetoric" would not be understood by readers as imputing the commission of a criminal offense).

Also highly significant in the Ohio Supreme Court's view was the fact that the Article appeared on the sports page, "a traditional haven for cajoling, invective, and hyperbole." 25 Ohio St. 3d at 253, 496 N.E.2d at 708. Quoting the *Ollman* observation that "[d]ifferent types of

writing have . . . widely varying social conventions which signal to the reader the likelihood of a statement's being either fact or opinion," the court concluded that:

On balance, . . . a reader would not expect a sports writer on the sports page to be particularly knowledgeable about procedural due process and perjury. It is our belief that "legal conclusions" in such a context would probably be construed as the writer's opinion.

25 Ohio St. 3d at 253-54, 496 N.E.2d at 708. See also *Greenbelt Coop. Pub. Ass'n v. Bresler*, 398 U.S. at 13-14 (understanding the nature of the forum in which the statement was made, readers would interpret critical commentary as opinion and not as a representation of fact).

Though not discussed explicitly in the Ohio Supreme Court's opinion, an even broader "contextual analysis" supports the court's conclusion that the Article conveyed opinionated commentary rather than factual reporting. The events surrounding the altercation at the Mentor-Maple Heights wrestling meet had been the subject of ongoing controversy throughout Ohio, and particularly so in the two communities whose wrestling teams were involved. In the *News-Herald*, which serves the Mentor community, Diadiun had written a series of articles on Milkovich's active involvement in the altercation. The matter had apparently been settled by the Ohio High School Athletic Association, which disqualified the Maple Heights team from the state tournament and placed it on probationary status, and censured Milkovich, a nationally-known coach, for his actions during the meet. All of this was apparently undone, however, when the Franklin County Court of Common Pleas reversed the probation and disqualification orders.

Writing in a newspaper that served the Mentor community, Diadiun expressed the outrage that all interested members of that community must have felt—i.e., that Milkovich and Scott, in testifying at the court hearing, had sought to avoid responsibility instead of admitting it, thereby setting a poor example for the students. As the Ohio Supreme Court correctly concluded, Diadiun's commentary, vehement as it was, would have been understood by the average reader to be what it actually was—an expression of the author's heart-felt opinion.

CONCLUSION

Initially filed in 1975, this lawsuit has taken on a life of its own, a convoluted one at that. It has seen a decision favorable to Milkovich by the Ohio Supreme Court, and a denial of certiorari by this Court over the strong dissent of Justices Brennan and Marshall. It then saw the highly unusual situation in which the *Milkovich* decision was overruled by the Ohio Supreme Court two years later in a case involving the very same Article, with a clear holding that the Article was protected as opinion under the Ohio Constitution.

It appeared for a time that the *Milkovich* and *Scott* cases might end in inconsistent judgments, in that the *Scott* case had been decided in the News-Herald's favor, while *Milkovich* was before the trial court on remand with instructions to conduct a jury trial. This problem was obviated, however, when the trial court entertained a renewed motion for summary judgment by the News-Herald, and granted the motion on the basis of the intervening decision in *Scott*.

After fifteen years of litigation, it is time for these lawsuits to come to an end. In the *Scott* decision, the Ohio Supreme Court adopted a legal standard that is consistent in all respects with the federal precedents, basing its decision not only on the opinion protection of the Ohio Constitution but also on the absence of evidence tending to satisfy the actual malice standard of *New York Times v. Sullivan*. Premised, as it is, upon the *Scott* decision, the resolution in the *Milkovich* case is consistent and entirely correct. Manifestly, the case presents no issues warranting review by this Court.

Accordingly, Milkovich's petition for a writ of certiorari should be denied.

Respectfully submitted,

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